

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

Supreme Court, U.S.

FILED

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C & A CARBONE, INC.,  
RECYCLING PRODUCTS OF ROCKLAND, INC.,  
C & C REALTY, INC., and  
ANGELO CARBONE,

*Petitioners,*

v.

TOWN OF CLARKSTOWN,

*Respondent.*

On Writ of Certiorari to the Supreme Court. --  
Appellate Division, Second Department  
of the State of New York

BRIEF *AMICI CURIAE* OF OGDEN PROJECTS, INC.;  
LEHMAN BROTHERS, INC.; SMITH BARNEY  
SHEARSON INC.; SANTEK ENVIRONMENTAL, INC.;  
AND READING ENERGY COMPANY  
IN SUPPORT OF THE RESPONDENT

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IN SUPPORT OF THE RESPONDENT \***

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**INTERESTS OF THE AMICI CURIAE**

*Amici* provide waste disposal and investment banking services to municipalities that seek to implement their solid waste management plans. *Amici* assist municipalities to finance and construct waste-to-energy facilities, recycling facilities, compost facilities, transfer stations and landfills.

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\* *Amici curiae* submit this brief, on consent of all parties pursuant to Rule 37.3 of this Court, in support of Respondent Town of Clarkstown.



Flow control supports the solid waste management planning process, permitting municipalities to develop local, state-of-the-art disposal facilities. *Amici* believe that if the decisions below are not affirmed, municipalities will be forced to adopt more expensive and less efficient means of implementing solid waste management plans required by federal and state environmental legislation.

The purpose of this *amici curiae* brief is to provide the Court with the private sector perspective on the nature of municipal solid waste projects and the critical role that flow control plays in the safe, efficient disposal of garbage.

OGDEN PROJECTS, INC. (OPI) is an industry leader in the design, construction and operation of environmentally safe, technologically superior waste-to-energy facilities. OPI currently operates 24 projects at 23 locations across the United States, with four more projects under construction. These facilities are located in fifteen states from Massachusetts to Hawaii. These 24 projects process 28,135 tons per day of solid waste, accounting for 28% of the waste-to-energy market.

LEHMAN BROTHERS INC. (Lehman Brothers) is a recognized national leader in financing solid waste/resource recovery facilities. Since 1980, Lehman Brothers has been or continues to be senior manager, co-managing underwriter or financial advisor on over 110 current and completed financings which involve total financings of over \$11 billion. Lehman Brothers works with municipal clients to analyze financing alternatives and to create financing structures to meet the ongoing solid waste needs of its clients.

SMITH BARNEY SHEARSON INC. (Smith Barney) has been involved in financing solid waste systems since 1975. Smith Barney has represented as investment banker or financial advisor over 60 major cities, counties and authorities. Smith Barney clients range from major

cities such as the Cities of New York and Los Angeles to rural counties. Since 1984, Smith Barney has managed 99 solid waste financings totaling approximately \$8.8 billion.

SANTEK ENVIRONMENTAL, INC. (Santek) designs, constructs, permits and manages state-of-the-art landfills on behalf of municipalities. Santek is a leader in the publicly owned, privately operated landfill industry.

READING ENERGY COMPANY (Reading Energy) is a privately-owned company specializing in the development, ownership and operation of resource recovery and waste processing facilities. Reading Energy's approach to resource recovery and waste processing seeks the most environmentally responsible solutions to the pressing problems of waste management. Reading Energy has developed and continues to develop waste-to-energy facilities across the United States.

#### SUMMARY OF ARGUMENT

The intent, purpose and effect of local flow control is not to protect local interests, but rather to enable a municipality, as solid waste disposer of last resort, to dispose of garbage safely. Lower courts have reached inconsistent, confused and incorrect conclusions by applying Commerce Clause analysis to garbage in a wooden, reflexive manner. The usual analysis assumes that the item in commerce has value. Garbage does not have value; it is a problem and it stinks. Municipalities do not enact flow control laws because they want more garbage business, they do so as part of their solution to a garbage problem. The ordinance is not protectionist because the Respondent is not attempting to protect local commercial interests, it is attempting to protect its solution to a local garbage problem. If the Petitioners were to go out of business, Respondent would still have the obligation to dispose of waste in order to provide for the health, safety and welfare of its citizens. The purpose of flow control

is not to make money for a municipality, but rather to ensure the success of its solid waste management plan. Flow control is an integral component of solid waste facility financing. In order to issue bonds to finance facility construction, waste (and the associated tipping fees) must be directed to the facility to ensure that sufficient revenues are available to pay bondholders.

Alternatives to flow control, such as economic flow control or municipal ownership of a comprehensive waste collection system, are never as effective and are always less efficient than legal flow control.

Local flow control does not impact interstate commerce because it is a purely local solution to a local problem. Modern environmental legislation such as the Resource Conservation and Recovery Act of 1976 places the burden of closing outdated landfills and creating new solid waste management systems squarely on the shoulders of municipalities like the Respondent.

## ARGUMENT

### I. THE INTENT, PURPOSE AND EFFECT OF LOCAL FLOW CONTROL IS NOT TO PROTECT LOCAL INTERESTS, BUT RATHER TO ENABLE A MUNICIPALITY, AS SOLID WASTE DISPOSER OF LAST RESORT, TO DISPOSE OF GARBAGE SAFELY

#### A. Introduction

Garbage is a unique commodity. Garbage has negative economic utility. Garbage stinks. People pay to get rid of garbage, not to acquire it. States try to ban its importation. Residents bitterly oppose siting disposal facilities in their neighborhoods. Garbage attracts vermin. It creates fire and explosion hazards, and it pollutes the air and groundwater. Municipal garbage disposal sites constituted 22% of Superfund's 1986 proposed National Priority List. Garbage is a local, state and national health

and safety problem. Garbage *qua* garbage is not, as Petitioners claim, a "valuable commodity." Petitioners' Brief (Pet. Br.) at 14.

Lower courts have inconsistently resolved the tension between usual Commerce Clause jurisprudence and the traditional obligation of municipalities properly to dispose of all garbage within their jurisdictions. Where, as here, a commodity has negative value and is shipped in interstate commerce not to consume it, but solely to get rid of it, Commerce Clause analysis can result in confused and unsatisfactory results. The analysis is further complicated by the fact that municipalities do not enter the garbage disposal business voluntarily, but rather to meet a traditional obligation to dispose of all garbage. *Amici* thus believe the unique circumstances of this case do not readily lend themselves to usual Commerce Clause analysis.

Safe garbage disposal has long been the exclusive province of local municipalities.<sup>1</sup> *Gardner v. Michigan*, 199

<sup>1</sup> See Office of Solid Waste, United States Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, at 11 (Sept. 1988); (ultimate responsibility for waste management falls on state and local governments); 1A Frank P. Grad, *Treatise on Environmental Law* § 4.02, at 4-46 (1991) (1987 fifty-state survey indicating, *inter alia*, which states specifically place responsibility for garbage collection and disposal on local governments); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981) *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). ("Control of local sanitation, including garbage collection and disposal . . . is a traditional exercise of municipal police powers reserved to state and local governments under the Tenth Amendment") (emphasis added). State solid waste management activity has historically been minimal, and "for the most part limited to formally delegating authority to municipalities for solid waste management . . .". Office of Technology Assessment, Congress of the United States, *Facing America's Trash: What Next for Municipal Solid Waste*, (1989), at 348; Office of Solid Waste, United States Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, Availability of a Draft Report and



U.S. 325 (1905). This exclusive local jurisdiction has been unsuccessfully attacked on antitrust grounds, *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985), and on property "takings" grounds, *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 205 (1905). Petitioners now attack this exclusive local jurisdiction on dormant Commerce Clause grounds. This is a tired argument that has been raised in various guises but repeatedly rejected by the courts.

#### B. The Ordinance Is Not Protectionist

Petitioners contend that the ordinance fails the "economic protectionism" test of *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Pet. Br. at 16-25. Garbage disposal is a recognized national problem. Petitioners contend that an ordinance that seeks to cure a local contribution to that problem somehow implicates protectionist concerns. Petitioners are wrong. *City of Philadelphia* does not apply to this case because Respondent's ordinance is not protectionist in intent or effect.

The test applied in *City of Philadelphia* was whether the law in question "is basically protectionist, or whether it can be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." 437 U.S. at 624. If a local ordinance passes the *City of Philadelphia* test, then the incidental impacts on interstate commerce are to be evaluated under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) wherein the Court must consider the "nature of the local interest involved" and "whether it could be promoted as well with a lesser impact on interstate activities", 397 U.S. at 142 (emphasis added).

Announcement of Public Hearings, 53 Fed. Reg. 36,885 (1988) ("State and local governments should assume responsibility for the wastes generated within their jurisdictions").

Local flow control ordinances are not protectionist. They do not implicate any of the concerns articulated in *City of Philadelphia* or any of the other concerns that underlie the usual dormant Commerce Clause analysis.

This case is unique. It is the first to come before this Court where Commerce Clause protection is sought for garbage *qua* garbage. This case is *not*, as Petitioners contend, Pet. Br. at 20, about *preserving* a state's natural resources, as in *City of Philadelphia*, 437 U.S. at 617.<sup>2</sup> Here state resources are being *expended* by siting a local solid waste facility to solve a local problem. Similar resources of other states are necessarily *conserved*.

This case is not therefore about economic isolation, or about economic Balkanization, or about protecting parochial state interests, as Petitioners contend. Pet. Br. at 15-16. Respondent is not hoarding a natural resource or product for its own use. It is solving its local *problem*: the scourge of local garbage.

Respondent is not attempting to foist its health and safety problem on other states, as was the case in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 687 (1981) (state statute may not secure to the state the benefits of large trucks, while also diverting to other states the many safety and economic costs associated with their use). Respondent is not enacting a politically expedient scheme "to isolate itself in the stream of interstate commerce from a problem shared by all," *City of Philadelphia*, 437 U.S. at 629; it is *solving* its garbage problem in a way that does not interfere with the ability of other municipalities to cure their own garbage disposal problems.

<sup>2</sup> See *Hughes v. Oklahoma*, 441 U.S. 332, 331 (1979) (characterizing the state action in *City of Philadelphia* as an attempt to "conserve" the natural resource of landfill areas within the state); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources*, 504 U.S. —, 112 S.Ct. 2019 (1992) (striking down garbage import ban on same grounds as *City of Philadelphia*).

The purpose of prohibiting economic Balkanization is to avoid trade embargos and retaliatory state practices. *H.P. Hood & Sons, Inc. v. DuMond*, 335 U.S. 525, 532-33 (1949). If all states enacted export bans on products or services, remaining states would be deprived of raw materials or competitive products or services, and the national economy would suffer.<sup>3</sup> By contrast, a municipality effectively *removes* a burden from other jurisdictions when it disposes of garbage—an action that is consistent with federal mandates and state laws that require the proper management and disposal of solid waste.<sup>4</sup>

This case is about garbage *qua* garbage, and garbage is a *problem*, not a commodity. There simply can be no protectionist intent or effect when a municipality seeks to resolve locally its contribution to a national problem.

**C. Flow Control Is a Tool Essential for Municipalities to Meet Their Obligations As Solid Waste Disposers of Last Resort**

Local governments in the United States are the disposers of last resort for solid waste generated within their borders.<sup>5</sup> Contrary to the claims of Petitioners, the pri-

<sup>3</sup> Examples include bans on the export of minnows, *Hughes v. Oklahoma*, 441 U.S. 332; uncrated cantaloupes, *Pike v. Bruce Church, Inc.*, 397 U.S. 137; unimpeded movement of interstate trucking, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662; and landfill space, *City of Philadelphia v. New Jersey*, 437 U.S. 617).

<sup>4</sup> Local flow control ordinances do not, however, impede business competition in solid waste disposal services, as Petitioners contend. See Pet. Br. at 33. *Amici's* experience, based on numerous municipal solid waste transactions, is that the solid waste disposal market is very competitive. Municipal solid waste disposal contracts are overwhelmingly competitively bid by municipalities. Once this process is complete, the competition is over for the life of the contract. But this does not detract from the interstate competition that occurred during the competitive bidding process.

<sup>5</sup> See *supra*, n.1.

mary purpose of flow control is *not* to enhance a municipality's economic fortunes. Pet. Br. at 11, 15. The purpose of flow control is to ensure the success of local solid waste management plans and to enable municipalities to plan, design and construct solid waste disposal facilities. The reason municipalities seek in the *first* instance to design and construct their own solid waste disposal facilities is because they are the ones in the *last* instance with the obligation to dispose of solid waste.<sup>6</sup> The driving force behind acquiring control of the entire wastestream is the municipality's ultimate responsibility to manage and resolve the entire disposal crisis it faces.

Garbage cannot be allowed to accumulate in backyards, on curbs and in empty lots without adverse public health consequences. Traditional practices and federal and state law impose on municipalities the heavy burden of assuring that there is someplace to dispose of garbage, that this disposal option is structured to mitigate the public health problems garbage creates, and that the solution they select is reasonably affordable to their residents. It is not sufficient that municipalities solve only today's problem by relying on short-term solutions. To support the inevitable growth of their communities, municipalities must find long-term solutions to their disposal problems.

This obligation forces municipalities to exercise a fundamental police power by instituting solid waste management plans. In *amici's* experience, municipal officials do not see solid waste disposal as a commercial opportunity,

<sup>6</sup> The sagas of the so-called "garbage barges" provide a striking example of what happens when a municipality fails to plan and provide for adequate disposal capacity for all the waste disposed of within its borders. See Gutis, "The End Begins for Trash No One Wanted," *N.Y. Times*, Sept. 2, 1987, at B1, col. 3 (describing the end of the 162-day, 6,000-mile odyssey of a barge filled with trash); "Soil on Troubled Waters," *N.Y. Times*, Apr. 29, 1987, at A34, col. 1 (editorial) (describing wandering garbage barge from Islip, N.Y.).



but rather as an expensive, unpleasant and extraordinarily difficult obligation that is theirs alone to satisfy.

Once a municipality determines to design and construct a solid waste management facility, flow control becomes an important tool to meet that goal. A municipality cannot solve its entire solid waste problem unless it can control the flow of all solid waste within its borders. First and foremost, flow control permits the municipality to assure that all the waste generated within its borders is disposed of in a manner protective of human health and the environment. Not only is this responsible conduct but it may be necessary to avoid the imposition of Superfund liability on the community for improper disposal practices. Flow control minimizes the uncertainty surrounding solid waste disposal planning, especially in the area of sizing. This Court has characterized "accurate forecasts about the volume and composition of future waste flows" as an "indispensable part of a comprehensive solid waste management plan." *Fort Gratiot Landfill*, 112 S.Ct. at 2027.

If a disposal facility is too small, the municipality risks being unable to dispose of all solid waste, and being forced into expensive, stop-gap solutions. If the municipality's facility is oversized, economic dislocations arise and the municipality's costs become open-ended and uncertain, rather than managed and planned.

Environmental protection, long-term certainty and local crisis control are the motivating forces behind flow control ordinances, not, as Petitioners contend, Pet. Br. at 21-23, economic efficiency or advancement of parochial state interests. Municipalities do not wish to attract solid waste facilities to their borders. All municipal officials are painfully aware of the vehemence of local opposition to any solid waste facility.<sup>7</sup> In deciding on an available solid

<sup>7</sup> *Facing America's Trash*, at 3, n.2 (noting increasing public opposition to siting any solid waste facility).

waste disposal option, a municipality is interested, *first* and *foremost*, in reliable, environmentally sound, long-term disposal capacity to support its role as disposer of last resort.

In this sense, the Respondent's solid waste functions are similar to those of police and fire protection services. When we speak of police and fire protection services, we do not speak of the interstate or spot markets for these services, nor do we speak of business efficiency, nor do we speak of protecting local police and fire protection agencies from out-of-state competition. Instead, we speak of and recognize the need for municipalities to have their own police and fire protection services. *City of Chicago v. Sturges*, 222 U.S. 313, 322 (1911).

#### **D. Flow Control Is an Integral Component of Solid Waste Facility Financing and Is Critical to Future Solid Waste Facility Development**

When a municipality decides to meet its obligation as solid waste disposer of last resort by developing a transfer station, landfill, recycling facility, composting facility or waste-to-energy facility, it must determine how to finance it. Such facilities are capital intensive and very expensive.<sup>8</sup> Complex financial transactions necessarily become an integral part of a municipality's undertaking to provide these basic services. Few, if any, municipalities have the necessary funds on hand to pay for the required construction. Most municipalities have no choice but to borrow funds to finance such facilities in a time of shrinking budgets, insufficient tax revenues, economic recession and public resistance to tax increases.

If the community decides to obtain the benefits of a waste disposal facility by contracting for the construction

<sup>8</sup> In the experience of *amici*, modern solid waste facilities range from recycling facilities costing \$5 to \$10 million to waste-to-energy facilities costing \$150 to \$300 million.

and operation of a facility to be owned by the private sector, then the private owner must borrow funds (generally from the municipality) and justify the investment of its equity.

In *amici's* experience, most municipalities that finance their own facilities issue revenue bonds, whether the facility is publicly or privately owned. The sole source of funds for payment of principal and interest on revenue bonds is the revenue stream generated by the subject facility.<sup>9</sup> Private financings are likewise secured primarily by a pledge of the revenues from the facility. Before investors will purchase such bonds at reasonable interest rates, they must be confident that there will be sufficient revenues from the operation of the facility to cover payments of principal and interest to the bondholders.

In order to guarantee a flow of revenues to the project, the municipality must guarantee a sufficient flow of solid waste to the facility at fixed prices. A flow control ordinance is the mechanism that ensures an adequate supply of waste to the facility. Through this mechanism, the municipality is able to guarantee the revenue stream that accompanies the flow of waste and to provide the necessary credit support for the issuance of bonds to construct the facility. *United States v. O'Rourke*, 943 F.2d 180, 188 (2d Cir. 1981).

<sup>9</sup> Revenue bonds should be distinguished from general obligation bonds. Under state law, the issuer of general obligation bonds pledges its full faith and credit (that is, the power to tax constituents) to the payment of bondholders. The issuer of revenue bonds pledges only an identified stream of revenue to the payment of bondholders. See, e.g., N.Y. Local Finance Law § 2 (McKinney's 1968) (requirement that municipality pledge full faith and credit for the payment of principal and interest on general obligation bonds); N.Y. General Municipal Law § 864 (McKinney's 1986) (requirement that revenue bonds issued by an industrial development agency be special obligations payable solely from revenues).

Almost all solid waste financings also include contracts for the sale of facility outputs such as electricity, steam, recyclable materials or compost. Revenues from such sales do not represent profit for the municipality, but rather serve to offset a portion of the tipping fee. In order for such sales to be economically viable, the purchaser expects that the output of the facility will be dependable. Failure to meet this expectation can have severe economic consequences. For example, failure of a waste-to-energy facility to deliver dependable electric power to a utility may result in the forfeiture of the capacity payment due under the facility's contract with the utility. A guaranteed supply of solid waste is critical to maintaining the flow of revenue from the sale of facility output.

Even if a municipality were to finance the facility by issuing general obligation bonds, a guaranteed revenue stream would be necessary. A bond rating agency would seriously consider the adverse effects on a municipality's credit rating if the municipality were to place its full faith and credit behind bonds that were not supported by a guaranteed revenue stream from the facility, thereby driving up not only the cost of the facility, but also everything else the municipality borrows money to purchase. General obligation bonds are not, therefore, commonly issued to finance solid waste facilities because of the inability of municipalities to pledge their general credit for such projects as well as concerns about exceeding state constitutional debt limits.<sup>10</sup>

Use of a guaranteed waste flow as credit support for issuing municipal revenue bonds that finance solid waste facilities is precisely the type of transaction Congress envisioned when it considered the issue under the Resource Conservation and Recovery Act of 1976 (RCRA). Congress was keenly concerned about municipalities' ability to finance their own solid waste facilities. Congress

<sup>10</sup> See, e.g., N.Y. Local Finance Law § 4 (McKinney's 1968).



concluded that private companies were "capable of and willing to enter into resource recovery ventures if sufficient volumes of refuse [could] be guaranteed over a sufficiently long period of time." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272. Congress enacted specific provisions to encourage removal of state barriers to a municipality's ability to provide long-term guarantees of waste volumes. 42 U.S.C. § 6943(a)(5) (1988).<sup>11</sup> Congress considered, but explicitly rejected, loan guarantee programs for solid waste resource recovery projects. Instead, Congress directed EPA to establish teams of personnel to provide expertise for local planning efforts, including development of solid waste financing techniques. 42 U.S.C. § 6913 (1988). Congress recognized that solid waste disposal facilities would be financed primarily by issuing revenue bonds supported by guaranteed wastestreams. *See* H.R. Rep. No. 1491, *reprinted in* 1976 U.S.C.C.A.N. at 6248, 6316.<sup>12</sup> In response to this congressional initiative, states enacted

<sup>11</sup> RCRA's legislative history specifically endorsed, as a model for state planning, Wisconsin's regionalized waste management planning approach, which authorized legal flow control by providing that the local solid waste authority could require use of its facilities in order to make them financially viable. H.R. Rep. No. 1491, *reprinted in* 1976 U.S.C.C.A.N. 6238 at 6270. Wisconsin's statute is virtually identical to many state statutes authorizing flow control that were adopted after passage of RCRA. Since the passage of RCRA, at least 24 states have enacted legislation authorizing flow control ordinances as part of their solid waste management plans. *Pet. Br. at 14, n.1.*

<sup>12</sup> *See, e.g., Economic and Institutional Barriers to Private Investment in Resource Conservation and Recovery, Symposium on Resource Conservation and Recovery: Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976) (focusing on the economic feasibility of municipal financing of waste disposal facilities and the importance of guaranteed waste flows) at 95, 105, 107-8, 110 (statements of Ronald Schwegler, Stephen Lewis, John Bereny and Robert Aldrich) ("[I]n order to get the facility built the bondholders require community delivery requirements or community delivery contracts.") *See also* H.R. Rep. No. 1491, *reprinted in* 1976 U.S.C.C.A.N. at 6246 (topics discussed at symposium).*

flow control ordinances, and municipalities issued revenue bonds backed by wastestream guarantees. This transaction structure is now the accepted structure of municipal solid waste facility financing.

As compiled by Securities Data Corporation, the market for financing solid waste management facilities in the United States has accounted for the issuance of \$24,371,920,000 in municipal bonds since 1980 to pay for the construction of such facilities. Invalidating local flow control would adversely affect the ability of municipalities to construct solid waste facilities because it would impair their ability to finance them.

With respect to prospective transactions, *amici* are fully aware that the mere threat of invalidating flow control has already impeded the planning process undertaken by municipalities in advance of the actual construction of their solid waste management facilities.<sup>13</sup> The lack of certainty regarding flow control has made it difficult if not impossible for municipal officials to develop and implement realistic solid waste management plans for the disposal of solid waste.

<sup>13</sup> In Minnesota, where a flow control ordinance was recently invalidated under federal commerce clause grounds in *Waste Systems Corp v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), the Minnesota County of Winona is reevaluating its solid waste plans as a result of the decision. The County currently ships its waste to landfills as far away as Chicago. The County planned to use a flow control ordinance to gain control of the waste flowing out of state in order to build an environmentally beneficial composting facility. The County is now reevaluating its plans to determine whether the facility can be made viable without flow control. *See* Julie Forster, "Down in the Dump," *Winona Daily News*, March 18, 1992, at 1. In the meantime, the County's solid waste is currently being disposed of under the worst solid waste management option (landfilling) while plans to employ beneficial recycling through composting are put on hold or cancelled.



Contrary to the claims of the Petitioners, the primary purpose of flow control from the financing perspective is not to enhance the economic fortunes of the municipality enacting the statute.<sup>14</sup> The purpose of flow control in this context is to ensure that a guaranteed revenue stream is available to repay bondholders, thereby assuring the viability of a solid waste management system.

## II. UNDER THE BALANCING CRITERIA, ALTERNATIVES TO FLOW CONTROL DO NOT PRODUCE EQUAL RESULTS

Under the *Pike v. Bruce Church* balancing criteria, if, as here, a legitimate local purpose is found, the Court must balance the nature of the state interest with the impact on commerce, and consider whether the state "interest could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 124. While alternatives to flow control are available, they do not work "as well" as flow control.<sup>15</sup>

Municipalities attempting to solve the real world problem of solid waste disposal have only a few alternatives that might adequately substitute for legal flow control. Rather than compelling the delivery of solid waste to a

<sup>14</sup> Petitioners make much of the counterintuitive, if not absurd proposition that "localities that have adopted flow control laws rightly see trash as a resource that generates revenue, and the localities seek to hoard it for their own benefit." Pet. Br. at 15. Trash is not a *resource* to a municipality; it is a health and safety *problem* that the municipality must pay to get rid of. It does not produce revenue *for the municipality*; it produces revenue to *repay the bondholders*. It does not produce a "*benefit*" for the municipality; it produces a massive debt in the form of bonds issued to finance facilities to properly dispose of the waste.

<sup>15</sup> *Amici* ask the Court to note that while *amici* are part of the waste disposal industry, they are also involved in interstate commerce and are not troubled by flow control. Clearly, the waste disposal industry does not speak with one voice in this matter. *Amici* view flow control as part of the solution to the solid waste problem, not part of the problem.

planned destination by ordinance, municipalities can attempt to obtain a similar, if less precise, result from a waste flow perspective, by reducing the fee charged at municipal facilities to a below-market rate, and, at the same time, increasing taxes on constituents to pay for the shortfall. Solid waste haulers, given the option of paying a market rate for disposal or delivering their solid waste to a facility that charges little or no fee will always select the lower cost alternative.

"Economic flow control," as this structure is often called, is not as effective as legal flow control and does not lessen the burden on interstate commerce. *Economic flow control is less efficient than legal flow control*. Facilities equipped with up-to-date environmental controls will be more expensive to build and operate. Forcing municipalities to supplement disposal costs at their own facility with tax dollars in order to meet a lower price that might be charged by a less environmentally advanced facility, actually penalizes municipalities for complying with more stringent state environmental laws. Pricing under long-term contracts is likely at times to be higher than that charged in the short-term market. Competitive pricing again penalizes a community for seeking long-term solutions to their garbage problems. Moreover, under economic flow control, waste disposal fees are tax-based rather than volume-based. The link between the service and amount paid for the service is stretched to the point of breaking. Under legal flow control, the amount charged for disposal is directly related to the amount of solid waste disposed. Legal flow control results in a more efficient allocation of resources because it better reflects the aggregate social cost of solid waste management.<sup>16</sup>

<sup>16</sup> Petitioners state that flow control is inconsistent with waste-to-energy. Pet. Br. 34-35. One of *amici*, Ogden Projects, Inc., is the nation's leading provider of waste-to-energy facilities with 28 facilities operating or under construction. All but two are supported by legal flow control statutory schemes.

The taxes typically used to finance economic flow control are subject to practical as well economic and political limitations. As a practical matter, local governments have little flexibility to adjust taxes to meet a rapidly changing solid waste market. Tax levies and budgets for expenditures are typically set once per year. Even if a municipality could set a competitive tipping fee, it does not have the flexibility to keep the fee competitive (in response to the competition lowering *its* tipping fee) without depleting the municipal treasury of funds budgeted for other critical municipal services (*e.g.*, police, fire and schools). It is difficult to set an appropriate tipping fee. Too high a fee may cause the waste to go to competing sites. Too low a fee would cause additional waste from other sites to come in, creating sizing problems and resulting in a municipality's taxes subsidizing the waste disposal activities of others. It is politically difficult either to increase general taxes or add a line item tax to a citizen's tax bill in an era when most citizens already feel over-taxed.<sup>17</sup> Citizens who know that they are paying increased taxes for the disposal of their solid waste are less likely to participate in recycling and other waste reduction practices because they know that it will not have an effect on their personal finances.

Another alternative would have the municipality take over the entire function of collecting and disposing of solid waste. But this has significant disadvantages, too. The capital investment in collection trucks and transfer vehicles may be beyond the means of the community, and the staff needed to collect the waste would add significant costs of operation. Alternatively, it could contract with

<sup>17</sup> While it is true that two of the nation's wealthiest jurisdictions (Montgomery County, Maryland and Palm Beach, Florida, as described at Pet. Br. at 28-29) have sufficient revenues to pay for economic flow control, not all jurisdictions have the same resources. Certain of *amici* are involved in both of the described transactions. Both jurisdictions instituted economic flow control because of fear of lawsuits such as the instant case.

a single collection firm to collect all waste in the community on the condition that the collection firm bring all waste to the designated facility. But either of these actions would further reduce competition by extending the municipal monopoly to hauling, an area of less environmental concern.

The impact on interstate commerce of any of these alternatives is the same as flow control. A municipality's waste will end up in the municipality's disposal facility under both alternatives; and hence none of these options provide any reduced burden on interstate commerce. There are no alternatives that serve the local interest "as well with a lesser impact on interstate activities."

### III. LOCAL FLOW CONTROL DOES NOT IMPACT INTERSTATE COMMERCE BECAUSE IT IS A PURELY LOCAL SOLUTION TO A LOCAL PROBLEM

Under Respondent's ordinance, all garbage which *comes to rest* within Respondent's borders must be taken for disposal to the town-designated facility. As such, the ordinance takes effect before interstate commerce commences (or, in the case of Petitioners' activities, commences again). This Court has recognized that an ordinance "however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs." *Parker v. Brown*, 317 U.S. 341, 361 (1943). Respondent has amply briefed this topic, and *amici* support this analysis.

Moreover, as in *Parker v. Brown*, a municipality is here confronted with "a problem local in character" that urgently demands local action to resolve. *Id.* at 363.

The responsibility for resolving garbage disposal problems has been placed wholly on local municipalities by tradition or state statute, as recognized by this Court, and kept there by Congress. As this Court has stated:



[It is] a *controlling obligation of the city, which it could not properly ignore*, to protect the health of its people in all lawful ways having relation to that object; and if, in its judgment, fairly and reasonably exercised, the presence of garbage and refuse in the city . . . would endanger the public health by causing spread of disease, then it could rightfully require such garbage to be removed and disposed of, even if it contained some elements of value.

*Gardner v. Michigan*, 199 U.S. 325 (1905) (emphasis added). In RCRA, Congress specifically declined to remove the responsibility for local collection and disposal of garbage from municipalities, stating "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies." 42 U.S.C. § 6901(a)(4). RCRA created a comprehensive regulatory system for managing the nation's hazardous waste but left the responsibility for managing solid waste to state and local authorities. This Court has recognized that the states have a "substantial interest in . . . easing solid waste disposal problems." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981). States traditionally delegate ultimate garbage disposal responsibilities to municipalities. See *supra*, n.1, *Facing America's Trash* at 348.

Respondent's solution to its garbage problem accords with the Court's reasoning in *Parker v. Brown* that "[t]here may be . . . local regulations whose effect on interstate commerce is such as not to conflict with but to coincide with a policy which Congress has established with respect to it." *Parker*, 317 U.S. at 363; *Cities Service Gas Company v. Peerless Oil & Gas Company*, 340 U.S. 179, 188 (1950) (where state and national interests coincide, local regulations governing a legitimate local problem survive Commerce Clause scrutiny). In RCRA, Congress declared its preference for local solutions to local garbage disposal problems. 42 U.S.C. § 6901(a)(4) (1988). Congress also expressed its preference for comprehensive

local solid waste management plans, including recycling and development of long-term solid waste disposal facilities. 42 U.S.C. §§ 6942-43 (1988). In response to its purely local problem, and to fulfill its delegated local responsibilities, Respondent in this case developed a local solution, consistent with congressional policy on local municipal waste disposal.

### CONCLUSION

The court below held that the Respondent's flow control law was consistent with the Commerce Clause of the United States Constitution. For all the reasons stated above, *amici* urge this Court to uphold the conclusion that municipalities are free to adopt flow control statutes to fulfill their municipal obligation to dispose of garbage safely and efficiently.

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